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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

Nos. 387-388

RECONSTRUCTION FINANCE CORPORATION,

*Petitioner,*

vs.

BANKERS TRUST COMPANY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF OF AMICUS CURIAE IN BEHALF OF HOWARD  
S. PALMER, JAMES LEE LOOMIS AND HENRY B.  
SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW  
YORK, NEW HAVEN AND HARTFORD RAILROAD COM-  
PANY, DEBTOR.**

HERMON J. WELLS,

*Amicus Curiae in behalf of Howard  
S. Palmer, James Lee Loomis and  
Henry B. Sawyer, Trustees of the  
property of The New York, New  
Haven and Hartford Railroad Com-  
pany, Debtor.*

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**Statement.**

This brief deals with the question whether or not allowances for services and expenses of a mortgage trustee rendered and incurred in proceedings for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, are subject to maximum limits fixed by the Interstate Commerce Commission as required by Section 77(c)(12)\* of that Act. It is filed in behalf of

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\* 11 U. S. C. A., Sec. 205(c)(12).

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, in proceedings for the reorganization of that company, under Section 77. Said Trustees have an interest in this question because in the New Haven proceedings it has been decided adversely to the respondent here (*In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor, No. 16562, United States District Court for the District of Connecticut*,—an unreported opinion, dated June 3, 1942, and printed in the Petition as "Appendix A"), and an appeal by respondent from that decision is now pending before the Circuit Court of Appeals for the Second Circuit.

To avoid duplication, the present brief will be limited to a discussion of two constitutional aspects of the aforesaid question.

### **Argument.**

**There is no conflict between Section 77(c)(12) and the provisions of the Mortgage Indenture with respect to services and expenses of respondent.**

In the Court below respondent claimed that its right to a lien on the mortgaged property for compensation and expenses would be impaired if Section 77(c)(12) were applicable to the services and expenses listed in its petition numbered 266 (R., p. 14 *et seq.*). We believe that respondent's whole argument on this point must fail for the simple reason that Section 77(c)(12) gives respondent exactly what the mortgage purports to give it—the right to payment of a reasonable sum for expenses and services. This can best be demonstrated by quoting, with appropriate emphasis, from the provisions of the Act and the mortgage.

Section 77(c)(12) says:

"Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, \* \* \* for the *actual and reasonable expenses* incurred in connection with the proceedings and plan and *reasonable compensation for services* in connection therewith by trustees under indentures."

In a similar vein the mortgage provides that (Article Twenty-third, R., p. 17, par. 5):

"The Trustees shall be entitled to *reasonable compensation for all services* rendered by them in the execution of the trusts hereby created, which compensation as well as all *reasonable expenses* necessarily incurred and *actually* disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

It seems clear that if Section 77 had failed to cover in any way the matter of allowances for expenses and services, and if respondent had proceeded under its mortgage to recover on account of the expenses and services listed in its petition, it could have received through its contract lien only "reasonable compensation for \* \* \* services" and reimbursement of "reasonable expenses", for that is the language of the indenture.\* The statutory standard for computing the amount of respondent's allowance is precisely the same. It says that respondent may receive in a proper case reimbursement for "reason-

\* For present purposes it seems unnecessary to go as far as the Commission went in claiming before the Court below that as a matter of *intention* the mortgage contract covered only so-called "routine" services and expenses, and not the services and expenses in issue here. Indeed we think that the language of the mortgage will not stand the strain thus put upon it and prefer to rest our argument on the fact that the mortgage and the statute establish the same legal standard in this case.

able expenses" and "reasonable compensation for services" (Section 77(c)(12)). And both the statute and the mortgage are equally well calculated to assure payment—the mortgage through the device of a lien ahead of bondholders, and the statute through the provision for payment in cash. Under such circumstances there can be no impairment of respondent's contractual lien (*Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510, 530 [1941]),\* and respondent's argument to the contrary seems to us to present this Court merely with a tempest in a teapot. Furthermore, if the Commission's maxima are below the "reasonable" sums required by the statute (and most mortgage indentures), the fault does not lie in the statutory standard but in the application of that standard by the Commission. The remedy in case of such an error would be to procure a review of the Commission's order,—not to launch an attack on the standard itself as respondent has done here.

Nor is there any conflict between the statute and the mortgage in the matter of procedure. The mortgage does not say who shall apply the standard of reasonableness and ascertain the amount that is due respondent for its services and expenses. Thus the parties left the selection of a forum to applicable law. That law (Section 77(c)(12)) selects the Commission as the body to apply the standard in fixing maximum limits, and it goes on to provide that the court may make reasonable allowances within those limits. Here, again, there is no inconsistency. The statute merely carries on where the mortgage is silent.

Thus, this case does not raise any question of the power of Congress through the Commerce and Bankruptcy

\* This Court there said:

"If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid."

clauses\* to regulate the provisions of an indenture that seeks to give a lien for more than is reasonable on account of a trustee's services and expenses that may be rendered or incurred in the course of a railroad reorganization. But if such an issue were present, respondent could draw no comfort from *Security Mortgage Co. v. Powers*, 278 U. S. 149, 456, because Section 77(c)(12) would prevent the "contingent liability" of the Debtor from ever becoming effective for more than a reasonable amount (*Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 480 et seq.; *Norman & Baltimore & Ohio R. Co.*, 294 U. S. 240, 307-310; *Continental Illinois Bank and Trust Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 680). And if there were any conflict between the mortgage and the federal law, that law would operate no more drastically upon the obligation of the mortgagor than did the state law in *Butzel v. Webster Apartments Co.*, 112 F. 2d 362, 368, 6 Cir., 1940, and *In re McCrory Stores Corp.*, 91 F. 2d 947, 949, 950, 2 Cir., 1937.

**Either Section 77(c)(12) and (e), or the Urgent Deficiencies Act, or both, grant adequate judicial review of maxima fixed by order of the Commission under Section 77(c)(12).**

In the Court below petitioner and certain other parties took the position that subsection (e), together with the appellate provisions of subsection (c)(12) of the Act [11 U. S. C. A., Sec. 205(e) and (c)(12)] provide a method that is constitutionally adequate for judicial review of the Commission's order fixing maximum limits within

\* Many of the provisions of Section 77 of the Bankruptcy Act are clearly traceable to power of Congress to regulate interstate commerce. These provisions include those relating to allowances, which if necessary could be supported by that power alone. See *United States v. Chicago, Milwaukee, St. P. & P. R. Co.*, 282 U. S. 311 (the \$2.50 deposit).

which the court may make allowances.\* On the other hand, respondent asserted a violation of the Fifth Amendment because of a claimed failure on the part of Congress to establish in Section 77 itself any means whereby the Commission's determination of a maximum might be reviewed, even if such maximum should be fixed so low as to be arbitrary or confiscatory. We think that respondent is wrong on this issue and that petitioner and the District Court in Connecticut (Petition, pp. 20, 21) are right when they say that in practice, and within the limits of judicial review of administrative action, Section 77 makes it possible for courts of bankruptcy to bring about any necessary upward revision of the Commission's maxima. But no useful purpose here would be served by duplicating the arguments of others on this point. Instead we shall confine ourselves to showing that respondent's position is untenable because another method of review is available if, as respondent claims, no review may be had within the framework of Section 77 itself.

\* Section 77 (e) states, in part, that:

"The judge shall approve the plan if satisfied that . . .  
 (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, *are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge.* . . . If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest *refer the proceedings back to the Commission for further action, in which event he transmit to the Commission a copy of any evidence received*" (italics supplied);

and Section 77(e)(12) provides as to appeals that:

"Appeals from orders of the court fixing such allowances [under Sec. 77(e)(12)] may be taken to the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily."

The statutory scheme for review under Section 77 is either appropriate to cause a necessary revision of the Commission's maxima or it is not appropriate for that purpose. If it is appropriate that ends the matter. If it is not (and this is our assumption for present purposes only) then review may be had under the Urgent Deficiencies Act of October 23, 1913 (28 U. S. C. A., Sections 41 (28) and 44; see Judicial Code, Section 207), which makes special provision for review of orders of the Commission.\* The Fifth Amendment does not require Congress to provide specifically in the Bankruptcy Act for review of the Commission's orders on allowances if provision therefor is made elsewhere. Indeed this was settled long ago, in principle, by *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 485, 486, where this Court answered with respect to Section 15a of the Interstate Commerce Act the very argument that respondent is now making. Mr. Justice Brandeis there said:

"It is further objected that no opportunity is given under Section 15a for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed

\* 28 U. S. C. A., Section 41 (28) states that:

"The district courts shall have original jurisdiction as follows: \* \* \*

"Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219);

and 28 U. S. C. A., Section 44 provides, in part, that:

"The procedure in the district courts \* \* \* in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in Sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under Sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States" (Oct. 22, 1913, c. 32, 38 Stat. 220).

in the act constitute a direct and indirect legislative fixing of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under Sections 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. *Ohio Valley Water Co. v. Ben Aron*, 253 U. S. 287, 64 L. ed. 908, P. U. R. 1920E, 814, 40 Sup. Ct. Rep. 327."

Accordingly, for present purposes it is entirely unnecessary to decide which of the opposing parties are correct in their view concerning the adequacy of the appellate provisions of Section 77. It is enough to know that if the Commission should limit so low a maximum as to give rise to an issue of confiscation, or if it should err in matters of law in the course of limiting a maximum, any party aggrieved thereby will be entitled to have the determination reviewed either (1) under Section 77 if such review is there provided for or (2) under the Judicial Code relating to review of orders of the Commission if no other special provision ~~therefor~~ is found in Section 77. After all, in order to dispose of respondent's claims under this head, this Court need not determine *which* method a litigant should follow if it seems clear that *some* method is available.\* The familiar method pro-

\* In *In re Chicago & N. W. Ry. Co.*, 7 Cir., 121 F. 2d 791, 798, note 2, the Court said:

"The method of review presents a question not necessary for us to decide, which is, How shall such an order by the I. C. C. be reviewed? By the court as in case of a review of an order made by a master? Or by an independent suit in any court of competent jurisdiction? That I. C. C. actions are reviewable seems to us quite clear, but where and how is a more difficult question, which is posed because not directly involved in this appeal."

vided by the Urgent Deficiencies Act may indeed be somewhat limited in scope (*Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156, 160), but it is constitutionally adequate, and it is available if respondent is right in its claim that no means of review is open under Section 77.\* In fact, the orders of the Commission on fees and expenses in the Milwaukee receivership were reviewed in this way (*U. S. v. Chicago, M. St. P. & P. R. Co.*, 282 U. S. 311, 323, 328).

### CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court for further proceedings in conformity with the statute.

Respectfully submitted,

HERMON J. WELLS,

*Amicus Curiae in behalf of Howard S. Palster, James Lee Loomis and Henry B. Sawyer, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor.*

\* In *Chicago & N. W. Ry. Co. v. U. S. and I. C. C.* (Civil Action No. 2810, D. C. N. D., Ill., May 29, 1941—not officially reported) a statutory three-judge court under the Urgent Deficiencies Act refused to grant relief from an order of the Commission denying an allowance under Section 77(c)(12), but the decision would have been different had the court concluded that Section 77 failed adequately to cover the right to a judicial hearing.